

**New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit**

TSB-A-13(29)S
Sales Tax
September 9, 2013

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S120806B

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner, an elementary school PTA, asks whether there are circumstances under which it may display and sell items subject to the sales tax to students at the school without being required to collect and remit sales taxes under the Tax Law.

We conclude that the Petitioner would have to collect sales tax in most of the circumstances it suggests. However, if Petitioner makes sales from the school cafeteria only four or five times during the school year on no particular schedule, its sales would not be considered sales made from a shop or store because they lack the required regularity and continuity. Petitioner, which has been granted exempt organization status for sales tax purposes by the Department, would not be required to collect and remit sales tax to the Department on these occasional sales.

Facts

Petitioner is a not-for-profit organization, recognized as such by the IRS under IRC § 501(c)(3), and is recognized as an exempt organization for New York State sales tax purposes. Petitioner's exempt purpose is to enrich the programs and promote the welfare of the students at the elementary school.

As one of its activities, Petitioner occasionally sells school related items (e.g., pencils) on school property during the school day. This is a minor fundraiser for Petitioner, but it also provides a service to students by offering easy access to purchase needed school supplies. The sales occur in a corner of the cafeteria and are conducted entirely by volunteers.

Petitioner always considered these sales to be subject to sales tax and is current in its sales tax filings and remittances. However, over time, Petitioner repeatedly has been advised by tax professionals and others that it would not be required to collect sales tax under various circumstances, including:

- Not operating on a regular basis (i.e., operating only four or five times during the school year on no particular schedule);

- Selling items at or below cost;
- Paying sales tax on its purchase of the items to be resold to students; or
- By selling only a bare minimum of items (e.g., only pencils), thereby not being a “retail establishment.”

Petitioner asks whether these or any other circumstances would allow a not-for-profit organization to have goods available for display and sale to students, without being required to collect and remit sales tax.

Analysis

While Petitioner is an exempt organization for sales tax purposes, its exemption does not extend to retail sales of tangible personal property made from a “shop or store” it operates. *See* Tax Law § 1116(b)(1). A “retail sale” is defined in Tax Law § 1101(b)(4) as “[a] sale of tangible personal property for any purpose” other than for certain specified purposes such as resale. A “shop or store” includes “any place or establishment where goods are sold from display with a degree of regularity, frequency and continuity . . .” 20 NYCRR § 529.7(i)(2)(i). If Petitioner sells items in the school only four or five times during the school year on no particular schedule, its sales would not be considered sales made from a shop or store, because the sales would not be considered to be made with a degree of regularity and continuity. Such sales would be “sporadic and infrequent.” *See* TSB-A-97(36)S.

The other circumstances mentioned by Petitioner would not relieve it from its responsibility to collect and remit sales tax. Petitioner did not detail what kind of school supplies it sells, except for pencils, but the Tax Law does not provide a sales tax exemption for school supplies. Tax Law § 1105 imposes sales tax on the receipts from every retail sale of tangible personal property, except as otherwise provided; for example, there is no tax on sales of items purchased for resale. “Receipt” is defined as “[t]he amount of the sale price of any property . . . valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses or early payment discount . . .” Tax Law § 1101(b)(3). “Sale, selling, or purchase” mean “any transaction in which there is a transfer of title or possession, or both, of tangible personal property for a consideration.” *See* 20 NYCRR § 526.7(a)(1). There is nothing in the law or regulations excluding the imposition of sales tax when an item is sold at or below cost, or when only a “bare minimum” of items are sold. With respect to the suggestion that Petitioner pay sales tax on its own purchase of the items to be resold to students, the payment of tax by Petitioner would not alter its obligations to collect and remit tax when its sales to students are deemed to be from a “shop or store” as discussed above. Further, we note that Petitioner’s purchases are exempt from sales and use taxes, either because Petitioner is an exempt organization (Tax Law § 1116(a)(4)) or because the purchases would be for resale if Petitioner is operating a shop or store (Tax Law § 1101(b)(4)(i)(A)). When Petitioner is purchasing items for

resale, it should provide the vendor with a properly completed resale certificate (20 NYCRR § 526.6(c).)

DATED: September 9, 2013

/S/

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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.